

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA
2010 SEP 23 PM 4:57
JEANNE HICKS, CLERK
BY: R. Chamberlain

Larry A. Hammond, 004049
Anne M. Chapman, 025965
OSBORN MALEDON, P.A.
2929 N. Central Avenue, 21st Floor
Phoenix, Arizona 85012-2793
(602) 640-9000
lhammond@omlaw.com
achapman@omlaw.com

John M. Sears, 005617
P.O. Box 4080
Prescott, Arizona 86302
(928) 778-5208
John.Sears@azbar.org

Attorneys for Defendant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,)	No. P1300CR20081339
)	
Plaintiff,)	Div. 6
)	
vs.)	NOTICE OF DEVELOPMENTS
)	RELATED TO ETHICAL RULE
STEVEN CARROLL DEMOCKER,)	1.7
)	
Defendant.)	(Expedited Hearing Requested)
)	
)	
)	UNDER SEAL

Steven DeMocker, by and through counsel, hereby notifies this Court of recent developments related to Ethical Rule 1.7 and the State's attempts to interfere with Mr. DeMocker's right to counsel. The State has, for the fourth time, attempted to interfere with Mr. DeMocker's Sixth Amendment right to counsel. They have done this by repeatedly threatening counsel [REDACTED]. Just as

1 counsel was undertaking to carefully and responsibly consider the propriety of their
2 continued representation based on recent developments, the Sheriff's Office [REDACTED]
3 [REDACTED] that it knows to be yet another patently meritless,
4 unfounded and groundless [REDACTED]. This is in the face of prior
5 acknowledgment from this Court that defense counsel cannot, consistent with their
6 ethical obligations, continue to simultaneously defend against allegations against
7 counsel and defend Mr. DeMocker at trial. Knowing this, the State has again attempted
8 to interfere with Mr. DeMocker's Constitutional right to counsel as he tries to defend
9 himself. The misconduct of the Sheriff's Office [REDACTED] has completely
10 disrupted counsels' ability to consider the prior issues of their ability to continue to
11 represent Mr. DeMocker. Now counsel must once again contend with unfounded
12 personal attacks for simply doing their job as defense counsel.

13 The charges against Mr. DeMocker should be dismissed with prejudice as a
14 result of this ongoing pattern of intimidation and interference with Mr. DeMocker's
15 right to counsel under the Sixth Amendment. Alternatively, the Yavapai County
16 Attorney's Office should be disqualified from further prosecuting this case based on this
17 pattern of deliberate interference with Mr. DeMocker's right to counsel.

18 This motion is based on the due process clause, the Fifth, Sixth, Eighth and
19 Fourteenth Amendments, and Arizona counterparts, Arizona Rules of Evidence, Rules
20 of Professional Conduct, Arizona Rules of Criminal Procedure and the following
21 Memorandum of Points and Authorities.
22
23
24
25
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES

I. Background

On September 19, 2010, defense counsel were made aware of information that may affect their ability to continue to represent Mr. DeMocker.¹ The next day, on September 20, 2010, counsel filed an Under Seal Motion for 48 Hour Stay of Trial to consider these issues as well as an Ex Parte Motion. This Court held under seal hearings on September 21 and 22 and an ex parte hearing on September 22 to address these issues. During those hearings the defense indicated that it was investigating newly received information and counsels' ability to continue representing Mr. DeMocker pursuant to their ethical obligations. Counsel also advised the Court during these hearings that it needed to and had made inquiries of County Attorney's Office representatives that would affect these decisions. On September 21, defense counsel met with Jeffrey Paupore and Joe Butner, along with County Attorney Investigator Mike Sechez. During that meeting, Mr. Butner advised counsel that, among other things, the County Attorney would not pursue any charges [REDACTED] against defense counsel based on this newly received information.² At that meeting, counsel indicated that they understood that the representatives present needed to speak both with their superiors and with the Yavapai County Sheriff's Office before providing final answers to those questions.

At a hearing the following day, the Court, at defense counsels' request, set a hearing for 1:30 on September 24 and called off the jury until Tuesday, September 28 to permit counsel appropriate time to consult and consider the new information and their ability to continue.

¹ This information relates to the possible authorship of the so-called "anonymous email." This email was incorrectly characterized as a "confession" by the County Attorney in a recent public filing. Counsel are not addressing the contents of the email or other issues relating to this email in this pleading.

² Although defense counsel knew that there was no evidence to support any allegation, given the history of the case, they felt compelled to inquire.

1 At that same hearing on September 22 while waiting for the Court, Deputy County
2 Attorney Joe Butner, in the presence of Deputy County Attorney Jeff Paupore, advised
3 defense counsel that he had conferred with his superiors and that because there was no
4 evidence to support pursuit of defense counsel in connection with the newly received
5 information, no allegations or charges were forthcoming against defense counsel.
6 Inexplicably, after acknowledging that there was no evidence to support any allegation
7 related to defense counsel in connection with the newly received information on
8 September 22, 2010, the following day Mr. Butner contacted defense counsel to
9 nonetheless advise that the Yavapai County Sheriff's Office [REDACTED]
10 [REDACTED] relating to the newly discovered evidence.

11 **II. The Latest Frivolous Attempt to Interfere with Mr. DeMocker's Right to** 12 **Counsel**

13 The County Attorney and the Sheriff know that there is absolutely no evidence
14 [REDACTED] or any other allegation against John Sears with respect to the
15 "anonymous e-mail" information. During an interview of Renee Girard conducted on
16 September 19, 2010, County Attorney Investigator Mike Sechez repeatedly inquired of
17 Ms. Girard about Mr. Sears' prior knowledge of this newly received information.
18 Despite repeated badgering from Mr. Sechez, Ms. Girard consistently responded that
19 John Sears had no prior knowledge. Below are excerpts from this interview³:

20
21 RENEE GIRARD: Yes. I asked Steve during our visit if he had
told John Sears about this, and he said no, not yet. (Page 34)

22 MIKE SECHEZ: If he had this information, why not just give it to his attorney,
23 John Sears.

24 RENEE GIRARD: Uh-huh.

25
26 ³ Counsel take no position on whether or not the allegations stated in Mr. Sechez's questions or in Ms. Girard's
27 answers are true or false. The point in citing these excerpts is simply to advise the Court that there is no evidence
to support any allegation that John Sears had prior knowledge of the subject of these allegations, a fact which the
County Attorney's Office has acknowledged.

1 MIKE SECHEZ: So you ask him that --

2 RENEE GIRARD: Yeah.

3 MIKE SECHEZ: -- and he tells you that Sears didn't know about it yet?

4 RENEE GIRARD: Yes. (Page 35)

5 MIKE SECHEZ: So Steve DeMocker wanted this information to get
6 to his lawyer that he regularly visited with?

7 RENEE GIRARD: Yes. (Page 41)

8 MIKE SECHEZ: During this period of time, you had an awful lot of contact
9 with Steve DeMocker's defense team, specifically, John Sears. Did you ever
10 mention anything about this to John Sears?

11 RENEE GIRARD: No, John called me in to ask me if I knew where this email
12 came from and I said, no.

13 MIKE SECHEZ: Do you know when that was?

14 RENEE GIRARD: It was right after he received it. It was within days, a day or
15 days. (page 71-2)

16 MIKE SECHEZ: Do you -- to -- up until today, do you know if John Sears
17 knows that Steve authored it and Charlotte sent it to him?

18 RENEE GIRARD: My belief has always been that John Sears did not know
19 about this email, about who authored it and or who sent it. (page 72)⁴

20 This information is entirely consistent with jail calls in the possession of the
21 County Attorney on the subject matter as well.

22 The State knows that there is no evidence to support any allegation against
23 defense counsel and candidly acknowledged this on September 22. When asked on

24 ⁴ The State also repeatedly pursues a line of questioning about John Sears passing mail with Steve DeMocker that
25 is not legal mail. Again, Ms. Girard repeatedly advises them that John Sears was a conduit only for legal mail,
26 despite consistent badgering from County Attorney Investigator Mike Sechez. MIKE SECHEZ: I know what I
27 was going to ask you. On these phone calls, there are references made, if you wanna pass information be from
28 Steve to you or from you to Steve, just use John Sears as a conduit, he'll put it in his legal papers. This way you
can pass it without anybody knowing it. Was that done? RENEE GIRARD: That was done only with documents
that Steve had to sign, like, power of attorney. So I was getting power of attorney and Steve was gonna sign that,
it needed to be notarized, so John, in one of his attorney visits, took the document to Steve, he signed it, John
notarized it and John returned it to me. So beyond that, I don't recall anything ever being passed that way. (Page
73)

1 September 23 if there was any new information to support [REDACTED] in the past
2 24 hours, County Attorney Joe Butner advised that there was not, that the Sheriff was
3 "pissed" at John Sears and "that's what it's about." [REDACTED]
4 [REDACTED]

5
6 **III. The State's Pattern of Attempts to Interfere with Mr. DeMocker's Right**
7 **to Counsel**

8 This [REDACTED] and attempt to interfere with Mr. DeMocker's
9 right to counsel must be seen in the larger context of this case. This [REDACTED]
10 [REDACTED] in the course of his representation of Steve
11 DeMocker.⁵ The [REDACTED] was initiated by the County Attorney mid-trial.
12 The State also initiated an unfounded criminal investigation of defense counsel during
13 the trial of this case. The defense has previously filed a Motion to Dismiss with
14 Prejudice based on the State's actions in this case. That Motion and the defense reply is
15 hereby incorporated by reference. (Filed July 16, 2010).

16 In the face of these [REDACTED] and notice of a criminal investigation,
17 initiated mid trial, defense counsel advised the Court that they could only continue to
18 represent Mr. DeMocker at trial if they were not forced to respond to [REDACTED]
19 [REDACTED] (July 17, 2010 Defendant's Response to the Court's Inquiries
20 from July 14, 2010). The State was fully aware that further unfounded allegations of
21 misconduct would lead to further disruption of the attorney client relationship.

22 That was precisely their intent.⁶

23 ⁵ The [REDACTED] the Sheriff was [REDACTED] The [REDACTED] by the County Attorney has [REDACTED]
24 ⁶ The Arizona Supreme Court has rejected arguments by the state that a violation of a defendant's rights occurred
25 when the sheriff's office seized defendant's documents, implying that the County Attorney's office would then be
26 free from any blame. *State v. Warner*, 772 P.2d 291, 295, 150 Ariz. 123, 127 (1986). The Supreme Court held,
27 "[b]oth offices are government entities and the judicial standards governing investigative misconduct are equally
28 applicable to prosecutors and police." *Id* citing *see State v. Tucker*, 133 Ariz. 304, 308, 651 P.2d 359, 363 (1982);
B.L. Gershman, *Prosecutorial Misconduct* § 1.2 (1985). The Court further concluded, "[i]f this were not so,
prosecutors would be able to persuasively argue, for example, that the exclusionary rule should not apply in cases
of police misconduct."

1 Ethical Rule 1.7 provides that a lawyer shall not represent a client if the
2 representation involves a concurrent conflict of interest. E.R. 1.7(a). Comment 10 to
3 this rule provides that “[t]he lawyers own interests should not be permitted to have an
4 adverse effect on the representation of a client.” No waiver of such a conflict is
5 permitted, where a lawyer does not “reasonable believe[] that the lawyer will be able to
6 provide competent and diligent representation to each affected client.” E.R. 1.7(b)(1).
7 The State has again attempted to create a conflict between Mr. DeMocker’s interests in
8 defending himself and his counsel’s interest in defending themselves against baseless
9 accusations of professional misconduct.

10 **IV. Deliberate Interference with the Right to Counsel Necessitates Dismissal** 11 **with Prejudice**

12 The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused
13 shall enjoy the right ...to have the Assistance of Counsel for his defense.” The Supreme
14 Court has held that this includes the right to the defendant’s counsel of choice. See
15 *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006), citing *Wheat*, 486 U.S. at
16 159. “We have previously held that an element of this right is the right of a defendant
17 who does not require appointed counsel to choose who will represent him.” *Id.* This
18 right does not arise from the right to a fair trial, but rather, “a particular guarantee of
19 fairness to be provided-to wit, that the accused be defended by the counsel he believes
20 to be best.” *Id.* at 146. A violation of the right to counsel of choice is a structural error
21 that requires reversal. See *Gonzalez-Lopez*, 548 U.S. at 150. This is so because the
22 right to counsel of choice implicates “myriad aspects of representation” and “bears
23 directly on the ‘framework within which the trial proceeds... .’” *Id.* at 50, citing *Arizona*
24 *v. Fulminate*, 499 U.S. 279, 310 (1991).

25 In *Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982), the
26 United States Supreme Court plurality opinion held that:

1 the circumstances under which ... a defendant may invoke the bar of
2 double jeopardy in a second effort to try him are limited to those cases in
3 which the conduct giving rise to the successful motion for a mistrial was
intended to provoke the defendant into moving for a mistrial.

4 *Id.* at 2091. The plurality believed that:

5 a standard that examines the intent of the prosecutor, though certainly not
6 entirely free from practical difficulties, is a manageable standard to apply.
7 It merely calls for the court to make a finding of fact. Inferring the
8 existence or nonexistence of intent from objective facts and circumstances
is a familiar process in our criminal justice system.

9 *Id.* at 2089.

10 "Arizona case law is to the same effect as the federal cases in holding that
11 intentional judicial or prosecutorial overreaching designed to cause a mistrial will result
12 in a bar to any further prosecution." *Pool v. Superior Court in and for Pima County*,
13 139 Ariz. 98, 106 (1984). Article 2, Section 10, of the Arizona Constitution, the double
14 jeopardy clause, forbids retrial when there is "intentional prosecutorial misconduct."
15 *State v. Jorgenson*, 198 Ariz. 390, 391, ¶¶ 3-4, 10 P.3d 1177, 1178 (2000).

16 CONCLUSION

17 As the *Jorgenson* court stated:

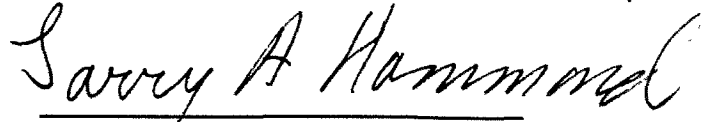
18 Application of double jeopardy is not only doctrinally correct when
19 egregious and intentional prosecutorial misconduct has prevented
20 acquittal, it is also required as a matter of pragmatic necessity. Any other
21 result would be an invitation to the occasional unscrupulous or
22 overzealous prosecutor to try any tactic, no matter how improper,
23 knowing that there is little to lose if he or she can talk an indulgent trial
24 judge out of a mistrial. The worst that could then happen is reversal for a
new trial and another shot at a conviction. This, of course, is exactly the
type of governmental abuse at which the double jeopardy clause was
aimed.

25 *Id.* 198 Ariz. 390, ¶ 13. The State's ongoing pattern of attempts to interfere with
26 Mr. DeMocker's right to counsel must be stopped by this Court and a mistrial with
27 prejudice should be declared. Alternatively, this Court should disqualify the Yavapai
28

1 County Attorney's Office from continued prosecution of Mr. DeMocker.
2 "Disqualification of a prosecutor for a conflict of interest implicating due process rights
3 is within the court's discretion." *Villalpando v. Reagan*, 211 Ariz. 305, 308 (App.
4 2005). "[The prosecutor] represents the sovereign whose obligation is to govern
5 impartially and whose chief object is justice. Public confidence in the criminal justice
6 system is maintained by assuring that it operates in a fair and impartial manner. This
7 confidence is eroded when a prosecutor has a conflict or personal interest in the criminal
8 case which he is handling." *Turbin v. Superior Court*, 165 Ariz. 195, 198 (App. 1990),
9 citing *State v. Latigue*, 108 Ariz. 521 (1972). Here, Yavapai County has indicated an
10 interest that is inconsistent with the duty to safeguard justice. Therefore, the continued
11 involvement of the Yavapai County Attorney's Office violates Mr. DeMocker's right to
12 a fundamental fairness.

13 DATED this 23rd day of September, 2010.

14
15 By:



16 John M. Sears
17 P.O. Box 4080
18 Prescott, Arizona 86302

19 OSBORN MALEDON, P.A.
20 Larry A. Hammond
21 Anne M. Chapman
22 2929 N. Central Avenue, Suite 2100
23 Phoenix, Arizona 85012-2793

24 Attorneys for Defendant
25
26
27
28

1
2 **ORIGINAL** of the foregoing hand delivered for
3 filing this 23rd day of September, 2010, with:

4 Jeanne Hicks
5 Clerk of the Court
6 Yavapai County Superior Court
7 120 S. Cortez
8 Prescott, AZ 86303

9 **COPIES** of the foregoing hand delivered this
10 this 23rd day of September, 2010, to:

11 The Hon. Warren R. Darrow (via hand delivery to Robin Gearhart)
12 Judge Pro Tem B
13 120 S. Cortez
14 Prescott, AZ 86303

15 **COPIES** emailed this 23rd day of September,
16 2010, to:

17 Joseph C. Butner, Esq.
18 Jeffrey Paupore, Esq.

19 Chris Dupont
20 Trautman Dupont PLC
21 1726 North Seventh Street
22 Phoenix, AZ 85006-2205

23 *Savvy A Hammond*
24
25
26
27
28

3309537